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IN THE

# Supreme Court of the United States

October Term, 1963
No. 639

STUART ARONOFF; JASON and ILEYEN BERNIE; GLORIA BOYD; ALTHEA G. CASE; CLIFFORD R. GANS; NATHAN and IDA FRANKLIN; BUD CHARLES GORE and PHYLLIS GORE; MAX and TURA KLEIGER; SAMUEL ROBINSON and ANNA ROBINSON; HYMEN SMITH and SEVERT SMITH; MARTIN SIRODY and KATHRYN SIRODY; CLYDE E. and MARY JO SHIELDS; HARRY M. SUGARMAN and MARY SUGARMAN; MAX STEIN and FAY STEIN; ROY C. TROEGER and VIRGINIA RUFF TROEGER; RICHARD H. and PATRICIA TROEGER; HARLAND and IRENE WEIR;

*Appellants,*

*vs.*

FRANCHISE TAX BOARD of the State of California; STATE BOARD OF EQUALIZATION; JOHN W. LYNCH; GEORGE E. REILLY, PAUL R. LEAKE; RICHARD NEVINS and ALAN CRANSTON as members of the State Board of Equalization,

*Appellees.*

**Appeal From the Supreme Court of the State of California.**

## APPELLANTS' JURISDICTIONAL STATEMENT.

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IN THE

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October Term, 1963
No. .....

STUART ARONOFF, *et al.*,

*Appellants,*

*vs.*

FRANCHISE TAX BOARD of the State of California, *et al.*,

*Appellees.*

## APPELLANTS' JURISDICTIONAL STATEMENT.

Appellants submit herewith their statement, particularly defining the basis upon which this Court has jurisdiction upon Appeal, to review the final Order and Judgment of the Supreme Court of California denying an original Petition for Writ of Prohibition, discharging alternative Writ and Restraining Order. In denying the Petition the California Court upheld alleged tax assessments under Section 17297 of the Revenue and Taxation Code of the State of California.

### The Opinion Below.

The Opinion of the Supreme Court of the State of California has not been finally reported. A copy of the Opinion is attached hereto as Appendix A. Advance report citations are *Aronoff et al. v. Franchise Tax Board et al.* (July 18, 1963), 60 A. C. 123, 383 P. 2d 409.

## Jurisdiction.

1. This is an appeal by the named appellants from an Order of the Supreme Court of California denying original Petition for Writ of Prohibition seeking to void proposed assessments of additional personal income taxes pursuant to Section 17297 of the Revenue and Taxation Code of the State of California.

2. The Supreme Court of California handed down its Opinion on July 18, 1963. Theretofore, an Order to Show Cause and temporary Restraining Order had been issued. These Orders were discharged. Appellants' Petition for Rehearing in the California Supreme Court was filed on August 1, 1963 and denied on August 14, 1963. Notice of Appeal to this Court was filed by the named Appellants with the Clerk of the Supreme Court of California on the 14th day of October, 1963.

3. The jurisdiction of this Court upon appeal is conferred by 28 U. S. C. Section 1257(2). Appellants challenge the validity Section 17297 of the Revenue and Taxation Code of the State of California; and the Notice of Proposed Additional Assessment of Tax issued *ex parte* by the Franchise Tax Board of the State of California based upon Section 17297; and California Law relegating Appellants to refund actions, all a "statute of a state" within the meaning of 1257(2), on the ground that as applied to their businesses, it is repugnant to the Constitution of the United States; and the decision of the California Supreme Court was in favor of validity.

4. Cases believed to sustain the jurisdiction of this Court on Appeal include:

*Lawrence v. State Tax Commission,* 286 U. S. 276, 76 L. ed. 1102;

*Speiser v. Randall,* 357 U. S. 513, 2 L. ed. 2d 1460;

*Mount Vernon-Woodbury Cotton Duck Co. v. Alabama I. P. Co.,* 240 U. S. 30, 60 L. ed. 507;

*N.A.A.C.P. v. Alabama,* 357 U. S. 449, 2 L. ed. 2d 1488;

*Madruga v. Superior Court,* 346 U. S. 556, 98 L. ed. 290.

5. Section 17297 of the Revenue and Taxation Code of the State of California (formerly Section 17359) provides as follows:

> "In computing taxable income, no deductions shall be allowed to any taxpayer on any of his gross income derived from illegal activities as defined in Chapters 9, 10 or 10.5 of Title 9 of Part 1 of the Penal Code[1] of California; nor shall any deductions be allowed to any taxpayer on any of his gross income derived from any other activities which tend to promote or to further, or are connected or associated with, such illegal activities."
>
> (Added Stats. 1955. c. 939, p. 1691, §2, effective June 6, 1955. Former Section 17359, added by

[1]Chapters 9, 10, 10.5 deal generally with misdemeanors. However *Felony* offenses are also included. See for example Sections 337, 337b, 337c, 337.7 of the California Penal Code.

Stats. 1951, c. 232, p. 496, §1, effective May 3, 1951, contained indentical provisions except that it referred to computing "net income", instead of "taxable income")

6. Section 19081 of the Revenue and Taxation Code of the State of California so far as relevant here provides:

> "No injunction or writ of mandate or other legal or equitable process shall issue in any suit, action, or proceeding in any court against this State or against any officer of this State to prevent or enjoin the assessment or collection of any tax under this part;"
>
> (Added Stats. 1943, c. 659, p. 2407, § 1, as amended Stats. 1955, c. 1707, p. 3141, § 1.)

7. Article XIII, Section 15 of the California Constitution so far as relevant here, provides:

> ". . . No injunction or writ of mandate or other legal or equitable process shall ever issue in any suit, action or proceeding in any court against this State, or any officer thereof, to prevent or enjoin the collection of any tax levied under the provisions of this article; but after payment thereof action may be maintained to recover, with interest, in such manner as may be provided by law, any tax claimed to have been illegally collected."

8. The Notice of Additional Income Taxes Proposed to be Assessed issued on March 15, 1955 (applicable to the years 1951, '52, '53 and '54) to Appellant Roy C. Troeger is fairly illustrative; a copy of said Notice is attached hereto as Appendix B.

9. Only the named Appellants present this Appeal. Certain of the Petitioners in the original Petition for Writ of Prohibition before the California Supreme Court do not join in this Appeal.

In the case of *Schur v. Santa Monica,* 47 Cal. 2d 11, 300 P. 2d 831, the California Supreme Court reversed a trial court judgment adverse to the Appellants here. *Schur* did not discuss or involve the tax issues here presented but does review the Santa Monica Municipal ordinances and the findings of the City Council of Santa Monica approving the taxpayers' game and ordering issuance of business licenses and police permits.

## Questions Presented.

The Notice (Appendix B) of Additional Tax Proposed to be Assessed issued *ex parte* without prior Notice or hearing, accusation or statement of charges and applied retroactively. The Notice based on Section 17297 denied all business deductions and impliedly (but not expressly) adjudged Appellants guilty of unspecified felonies and misdemeanors as "illegal activities". Under California law the Notice is presumed correct and the burden is thereupon placed upon the taxpayer to rebut the presumption of criminal guilt thus established before administrative bodies and in court, by refund actions. Therefore the following questions are respectfully submitted:

1. Whether Revenue and Taxation Code Section 17297 and the Notice of Assessment based thereon denied due process of law under the Fourteenth Amendment (Section 1) of the Constitution of the United States,—

(a) By replacing the presumption of innocence with a presumption of criminal guilt founded upon a secret administrative notice;

(b) By requiring the taxpayer thus presumed guilty of an unspecified crime, to assume the burden of proof and re-establish his innocence before administrative bodies and in court, after payment of the assessment;

(c) By denying all business deductions and thereupon imposing excessive and unreasonable fines, penalties and forfeitures for criminal conduct under the pretense of the assessment of a civil tax but without prior criminal or civil judicial trial;

(d) By withdrawing all civil remedies by injunction, prohibition mandamus or other extraordinary relief to restrain the unconstitutional imposition of such criminal penalties under the pretense of the assessment of a civil tax. (Revenue and Taxation Code Section 19081 and Article XIII, Section 15 of the California Constitution.)

2. Whether Section 17297 of the Revenue and Taxation Code of the State of California as written, construed and applied impairs the privilege against self-incrimination conferred by the Fifth Amendment to the Constitution of the United States acting as a restraint upon the States by the Fourteenth Amendment (Section 1)—

(a) By requiring or necessitating the testimonial disclosure by the taxpayer of acts already committed of an alleged criminal nature;

(b) By inferring a substantiation of the implied charge of criminal guilt in the event of the taxpayers' refusal to testify.

3. Whether Revenue and Taxation Code Section 17297 as written, construed and applied, by sanctioning assessment of irrational and disproportionate penalties for misdemeanors impairs the Eighth Amendment of the Constitution of the United States prohibiting cruel and unusual punishment as such Amendment acts as a restraint on the States under the Fourteenth Amendment, Section 1.

4. Whether Section 17297 impairs due process of law in its reference to felonies and misdemeanors as "illegal activities" and "other activities, which tend to promote, or to further, or are connected or associated with such illegal activities", such reference being insufficient to inform citizens of average intelligence what criminal acts it declares punishable.

5. Whether Section 17297 as written, construed and applied impairs due process of law and the equal protection of the laws under the Fourteenth Amendment, Section 1, to the United States Constitution by imposing a levy on gross receipts computed at the same rate of tax as the income tax liability of taxpayers generally.

6. Whether Section 17297 as written, construed and applied to allow secret *ex parte* administrative determination that felonies and misdemeanors have been committed violates due process of law and the provisions of Article I, Section 10 of the Constitution of the United States in taking away property without trial or prior hearing, without accusation, right of confrontation, in subverting the presumption of innocence and redrawing the traditional rules of criminal evidence and in being a bill of attainder.

**Statement.**

From May 23, 1951 (and prior thereto) to October 5, 1954 Appellants operated or had financial interests in business establishments publicly operated on the beach walks, streets and piers of the recreation zone of the City of Santa Monica known as Ocean Park. The City of Santa Monica had issued to Appellants' business licenses and police permits authorizing Appellants to conduct at their places of business a game known as "Skill Ball". The licenses and permits were issued pursuant to Section 4226 and related sections of the Municipal Code of the City of Santa Monica.

The City Council of the City of Santa Monica, by public hearing in August of 1954 held pursuant to Ordinance 4226, unanimously approved Appellants' games.

The California Supreme Court, in *Schur v. Santa Monica*, 47 Cal. 2d 11, 300 P. 2d 831, held the findings of the City Council not subject to review *de novo* in the Superior Court, and reversed a contrary trial court decision.

While, as noted, the games were operated at locations most available to the beach-going public, no indictments etc. have ever been lodged against them.

We must presume that a vigilant and able district attorney, and other law enforcement officers, would not have countenanced the public maintenance of appellants' games over many years, had they, in the opinion of the law enforcement officers, been conducted in violation of any penal law.

Appellants filed partnership and personal income tax returns under the California Income Tax law for the years 1951, 1952, 1953 and 1954. The Franchise Tax

Board did not challenge on any relevant grounds the returns as filed. However in 1955 and after the decision of the trial court reversed in *Schur v. Santa Monica,* 47 Cal. 2d 11 Appellants received a Notice of Additional Income Tax Proposed to be Assessed (Appendix B). The Notice proposed to adjust the income tax liability of Appellants for the years 1951, '52, '53 and '54 by denying *all* usual business deductions under the authority of Section 17297 (then 17359) of the California Revenue and Taxation Code. The 1955 Notice impliedly (but not expressly) concluded that Appellants had been engaged in "*illegal activities*" during the years 1951, '52, '53 and '54 but the Notice did not specify any facts in support of the claim of "illegal activities" nor did the Notice specify what felonies and misdemeanors embraced within Chapters 9, 10 and 10.5 of the California Penal Code, Appellants had violated.

The Notice was based upon undisclosed information known only to the Franchise Tax Board. The *ex parte* nature of the Franchise Tax Board's assessment is confirmed in their Answer to Petition for Writ of Prohibition where it is alleged:

> "In that regard, respondents allege that the Franchise Tax Board's proposed assessments were based on the board's conclusion on the basis of all information available to it that the games in question were games of chance and violative of the Penal Code." (Par. VI, p. 4.)

The Franchise Tax Board contends here, as it erroneously did in *Speiser v. Randall,* 357 U. S. 513, 2 L. ed. 2d 1460, that the Notice of Assessment places upon the taxpayer the affirmative burden of proof in court, as well as before the taxing authorities, to negate

the Board's implied finding of criminal guilt. The Franchise Tax Board has declared its position:

> "It is well settled that in an appeal to the Board of Equalization, the proposed deficiency assessment is given the legal status of being prima facie correct and that the burden is on the taxpayer to show error and the amount of such error." (See also *Speiser*, 357 U. S. 513 at p. 521.)

The Proposed Assessments are enormous, aggregating in excess of $700,000.00 principal and interest, as against the named Appellants. The proposed Assessment against the taxpayer Appellants had no relationship to their regular and ordinary tax. For example, the regular tax liability of Appellants Roy and Virginia Troeger before the proposed additional assessment was $493.25. The Proposed Additional Assessment against Troegers was $32,383.87[2] inclusive of interest.

Appellants filed a written protest and, pursuant to California law, the Protest hearing was held before the Franchise Tax Board on April 30, 1959. At the Protest hearing before the Franchise Tax Board on April 30, 1959 the taxing officials declared that the purpose of the hearing was to receive from Appellants "any information or evidence as to why these games should not be considered to be games of chance."[3]

The Franchise Tax Board denied the Protest and thereafter, as permitted by California law, Appellants appealed to the State Board of Equalization. A hearing was held before the Equalization Board on August

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[2]See pages 9 and 10 of Petition for Writ listing proposed assessments (exclusive of interest) against Appellants.

[3]Proceedings at the Protest hearing are part of the record. Excerpt is attached as Appendix C.

17 and 18, 1961. On September 20, 1962 the State Board of Equalization, pursuant to Section 18595 of the California Revenue and Taxation Code affirmed the action of the Franchise Tax Board which, as has been stated, denied the Protest of the Appellants.

At the hearing before the State Board of Equalization the Board ruled that the failure of Appellant taxpayers to testify as witnesses would be held by the Board as evidence in support of the "factual allegations."[4]

On October 15, 1962 Appellants and other taxpayers who have not joined in this Appeal, filed an original Petition for Writ of Prohibition in the Supreme Court of the State of California.

Thereafter the Petition was transferred to the Third District Court of Appeal for the State of California and that Court issued an Order to Show Cause and Temporary Restraining Order. Thereafter and before decision the cause was re-transferred to the California Supreme Court where it was heard and argued *en banc*. On July 18, 1963 the Petition for Writ of Prohibition was denied and the Order to Show Cause and Temporary Restraining Order discharged.

Appellants throughout these proceedings have urged the Federal questions here restated. They were urged at the Protest hearing before the Franchise Tax Board; at the hearing before the State Board of Equalization; in the Petition for Writ of Prohibition and the Additional Memorandum of Points and Authorities filed with the Supreme Court of California; in the oral arguments before the District Court of Appeal and *en banc*

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[4]Proceedings before the State Board of Equalization are part of the record. Excerpt is attached as Appendix D.

before the California Supreme Court and in the Petition for Rehearing filed with the California Supreme Court.

## The Federal Questions Are Substantial.

### 1. The Dangerous and Novel, but Plain Implications of the Statute.

Revenue and Taxation Code 17297 includes, within the classification of "illegal activities", both felonies and misdemeanors. Thus, Penal Code 377b[5] punishes any person who bribes or attempts to bribe a participant in any sporting event (except a wrestling exhibition) such as baseball, football, basketball, boxing or horse racing with a fine of not exceeding $5,000.00 or imprisonment not exceeding 5 years or both said fine and imprisonment and this offense is a felony.

Section 337[6] of the California Penal Code, also included within the ambit of "illegal activities", reads as follows:

> "Every state, county, city, city and county, town or judicial district officer, or other person who shall ask for, receive, or collect any money, or other valuable consideration, either for his own or the public use, for and with the understanding that he will aid, exempt, or otherwise assist any person from arrest or conviction for a violation of Section 330 of the Penal Code; or who shall issue, deliver, or cause to be given or delivered to any person or persons, any license, permit, or other privilege, giving, or pretending to give, any au-

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[5]Penal Code 337b is included within Ch. 10 of Title 9 of Part 1 of the California Penal Code.

[6]Penal Code 337 is included within Ch. 10 of Title 9 of Part 1 of the California Penal Code.

thority or right to any person or persons to carry on, conduct, open, or cause to be opened, any game or games which are forbidden or prohibited by section 330 of said code; and any such officer or officers who shall vote for the passage of any ordinance or by-law, giving, granting, or pretending to give or grant to any person or persons any authority or privilege to open, carry on, conduct, or cause to be opened, carried on, or conducted, any game or games prohibited by said section 330 of the Penal Code, is guilty of a felony." (Section 337.)

It is a curiosity that apparently under Penal Code 337, members of the Santa Monica City Council (if the Franchise Board is correct), are subject to assessments under 17297 because of its action in approving appellants' games at the public hearing in August, 1954.

The Statute (17297), therefore, which this Court is called upon to consider, deals with the gravest crimes known to the criminal law, and, presumably, may be applied by the taxing authorities as penalties in addition to those prescribed by the Penal Code.

While the notice of proposed assessment (Appendix B) directed to the Appellant taxpayers here did not specify what Section of the California Penal Code they were accused of violating and, while as we have noted, Chapters 9, 10, 10.5 include many different types of offenses, misdemeanor and felony, the Board, by their briefs and at the hearing, have made it clear that Appellants are accused of the misdemeanor of operating a lottery—apparently in violation of Section 319 of the California Penal Code.

If Revenue and Taxation Code 17297 may constitutionally apply to the numerous felonies and misdemeanors of three Chapters of the California Penal Code, there is no reason why it may not apply to the entire Penal Code and all penal offenses.

If we may determine who are criminals by means of administrative notice in order to deny tax deductions, there is no reason why administrative notice may not be urged as a basis for determining who are to be imprisoned. What is essentially wrong with a Statute so simple and forthright? A fatal and dangerous error in such a Statute is that it violates the presumption of innocence and rules of evidence which are the foundation of our tradition of law.

The California Law then expresses a novel and alien philosophy pertaining both to felonies and misdemeanors, which may be summarized as follows:

> *All deductions, exemptions and privileges created by the State can be denied where there has been a violation of any section of the Penal Code as enacted by the California Legislature. The determination of whether or not a crime has been committed shall be within the sole discretion of the administrative body with the burden of proof upon the citizen. The discretion of the administrative body may be exercised by ex parte notice. Any injunctive procedures are prohibited since such denial is hereby designated a tax.*

**2. The California Law Impairs Due Process and Other Constitutional Guaranties.**

The heart of the California decision is the holding that "The due process clause does not guarantee the right to judicial review of tax liability before payment." (60 A. C. p. 126.)

We do not deny that ordinarily a tax refund suit satisfies due process in a tax proceeding. We do deny that a refund action is adequate where in addition to a question of monetary tax liability there is premised the essential and formal issue of criminal guilt. (*Lipke v. Lederer*, 259 U. S. 557, 66 L. ed. 1061.)

Thus, where the "tax" is, in truth, a criminal penalty —punishment for the commission of a crime—federal due process peremptorily rejects prior tribute as a condition to judicial intervention. (*Lipke v. Lederer*, 259 U. S. 557, 66 L. ed. 1061.)

Where taxing procedures result in the suppression of sacred constitutional rights such as free speech, or impose criminal guilt by administrative decree or by the *per se* effect of statutes or impose criminal guilt practically by the unfair shifting of the burden of proof, due process is not stultified because of the name "tax" and refund actions are rejected. (*Speiser v. Randall*, 357 U. S. 513, 2 L. ed. 2d 1460; *Lipke v. Lederer*, 259 U. S. 557, 66 L. ed. 1061.)

> "However designated 'It is not within the province of a [state] legislature to declare an individual guilty or presumptively guilty of a crime.'" (Holmes J. in *McFarland v. American Sugar Ref. Co.*, 241 U. S. 79, 60 L. ed. 899, 904.)

We invoke the analysis of *Speiser:*

"It is, of course, familiar practice in the administration of a tax program for the taxpayer to carry the burden of introducing evidence to rebut the determination of the collector. Phillips v. Dime Trust & S.D. Co. 284 US 160, 167, 76 L ed 220, 224, 52 S Ct 46; Brown v. Helvering, 291 US 193, 199, 78 L ed 725, 730, 54 S Ct 356. But while the fairness of placing the burden of proof on the taxpayer in most circumstances is recognized, this Court has not hesitated to declare a summary tax-collection procedure a violation of due process when the purported tax was shown to be in reality a penalty for a crime. Lipke v. Lederer, 259 US 557, 66 L ed 1061, 42 S Ct 549; cf. Helwig v. United States, 188 US 605, 47 L ed 614, 23 S Ct 427. *The underlying rationale of these cases is that where a person is to suffer a penalty for a crime he is entitled to greater procedural safeguards than when only the amount of his tax liability is in issue.* Similarly it does not follow that because only a tax liability is here involved, the ordinary tax assessment procedures are adequate when applied to penalize speech."

"It is true that in the present case the appellees purport to do no more than compute the amount of the taxpayer's liability in accordance with the usual procedures, but in fact they have undertaken to determine whether certain speech falls within a class which constitutionally may be curtailed." (357 U. S. 525.)

Here, too, the Franchise Tax Board purports to do no more than compute the taxpayers liability in accordance with the usual procedures but in fact the Board has undertaken the task of the District Attorney—to determine whether past conduct violates the California Penal Code—unfettered by jury or judge, the presumption of innocence, the necessity for accusation, the guarantee of the Fifth Amendment and with the burden of proof on the accused.

> "Since the entire statutory procedure, by placing the burden of proof on the claimants, violated the requirements of due process, appellants were not obliged to take the *first step* in such a procedure." (*Speiser*, 357 U. S. 529.)

*Speiser* holds Appellants are "not obliged to take the first step" *i.e.*, seek administrative relief. How then may California require them to take the final step—a final step where they must assume the novel burden of persuading the courts to hold them *not* guilty of criminal conduct over a past period of four years; and then only on the odious condition that tribute first be paid?

Where a "tax" assessment in truth is an assessment of a criminal penalty, so-called anti-injunction enactments may not constitutionally impair direct access to the courts. (*Lipke v. Lederer*, 259 U. S. 557, 66 L. ed. 1061.).

Where legislation imposes a punishment or penalty "*the availability after the fact of administrative and judicial proceedings . . . to contest the validity of the sanction*" does not satisfy federal due process. (*Kennedy v. Mendoza-Martinez*, 9 L. ed. 2d 644, 660.)

The mere use of the word "tax" or "deduction" is of little significance. This Court, in passing on the Constitutionality of a state tax is "concerned only with its practical operation, not its definition or the precise form of descriptive words which may be applied to it." (*Lawrence v. State Tax Commission*, 286 U. S. 276, 280, 76 L. ed. 1102, 1106.) (See also *Lipke v. Lederer*, 259 U. S. 557, 66 L. ed. 1061.)

Tax suits seeking penalties for crime, even though civil in form, are of a criminal nature and "are within the reason of criminal proceedings for all the purposes of the Fourth Amendment of the Constitution, and of that portion of the Fifth Amendment which declare that no person shall be compelled in a criminal case to be a witness against himself." (*Boyd v. United States*, 116 U. S. 616, 634, 29 L. ed. 746; *Compare United States v. Sanchez*, 340 U. S. 42, 95 L. ed. 47.)[7]

The necessity has thus arisen to answer the question of Mr. Justice Black in *Tot v. United States*, 319 U. S. 463, 473, 87 L. ed. 1519:

> "It is unnecessary to consider whether this statute, which puts the defendant against whom no evidence of guilt has been found in a procedural situation from which he can escape conviction only by testifying, compels him to give evidence against himself in violation of the Fifth Amendment."

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[7]We recognize that it is not yet held that the privilege against self-incrimination guaranteed by the Fifth Amendment is absorbed by the Fourteenth Amendment. See concurring and dissenting opinions in *Cohen v. Hurley*, 366 U. S. 117. However in the context of this case, disregard of the privileges against compulsory self-incrimination contribute measurably to the "fundamental unfairness" of the entire procedures and must be evaluated.

In *United States v. Kahringer*, 345 U. S. 22, 97 L. ed. 754 this court acquiesced in an act of Congress construed not to compel disclosure of "acts already committed" (p. 32). The statute here, as enforced, compels the disclosure of acts already committed if the taxpayers are ever to overcome the presumption of guilt attached to the notice of assessment.

Other egregious constitutional errors inhere in this proceeding.

Revenue Code 17297 as administered is a legislative bill of attainder since, as held in *United States v. Lovett*, 328 U. S. 303, 315, 90 L. ed. 1252 "legislative acts, no matter what their form, that apply either to named individuals or to easily ascertainable members of a group in such a way as to inflict punishment on them without a judicial trial are bills of attainder prohibited by the Constitution."

A gross receipts levy computed as it is here, at the rates applicable to income taxpayers generally and by the same procedures and by the same law is the clumsiest form of unconstitutional discrimination. (*Stewart Dry Goods Co. v. Lewis*, 294 U. S. 550, 79 L. ed. 1054.)

At common law conviction of a felony worked a forfeiture of the felon's real property on the theory of "corruption of blood". His personal property was forfeited not by his attainder but by his conviction. (Stephen, *History of the Common Law of England*, Vol. 1, pp. 487-488.) The enormous penalties imposed on the taxpayers here as misdemeanants is a fearful if modern revival of the "corruption of blood" theory. Clearly, however, the proposed levy, being out of all proportion to the offense is void as cruel and unusual

punishment in the Constitutional sense. (*Trop v. Dulles,* 356 U. S. 86, 2 L. ed. 2d 630.)

The Statutory expressions "illegal activities" and "other activities which tend to promote or further, or are connected or associated with such illegal activities" are clearly meaningless as a measure of criminal acts and are thus void under the Fourteenth Amendment.

If by use of the expression "illegal activities" something other than specific criminal conduct is intended the Statute is void. (*Robinson v. California,* 370 U. S. 660, 8 L. ed. 2d 758.)

The Notice having issued *ex parte,* and without support of prior evidence is void.

> "Just as 'Conviction upon a charge not made would be sheer denial of due process', so is it a violation of due process to convict and punish a man without evidence of his guilt." (*Thompson v. Louisville,* 362 U. S. 199, 4 L. ed. 2d 654; *De Jonge v. Oregon,* 299 U. S. 353, 362, 81 L. ed. 278, 282; *Cole v. Arkansas,* 333 U. S. 196, 201, 92 L. ed. 644, 647.)

**Conclusion.**

Appellants respectfully urge that this appeal brings before this Court Federal questions under the Constitution of unprecedented importance, questions so unique and substantial as to require plenary consideration for their resolution.

The rights of those suspected of crime, protected by centuries of constitutional tradition, are threatened with encirclement by a frankenstein taxing power.

We say, however, that when tax law wanders into novel areas such as the *de jure* enforcement of penal codes and suppression of free speech it must expect to sacrifice the immunities of its native habitat and to face exacting judgment before this Court and the Constitution which it guards.

The late Mr. Justice Jackson expressed sentiments in *Kahringer* which we trust shall always prevail:

> "It will be a sad day for the revenues if the goodwill of the people towards their taxing system is frittered away in efforts to accomplish by taxation moral reforms that cannot be accomplished by direct legislation."

Respectfully submitted,

THOMAS W. LESAGE,
*Counsel for Appellants.*

## APPENDIX "A".

### Opinion of the Supreme Court of the State of California.

[Sac. No. 7440. In bank. July 18, 1963.]

Stuart Aronoff et al., Petitioners, v. Franchise Tax Board et al., Respondents.

Proceeding in prohibition to restrain the Franchise Tax Board from taking any further steps to collect income taxes assessed against petitioners. Order to show cause discharged and peremptory writ denied.

LeSage & Bowman and Thomas W. LeSage for Petitioners.

Stanley Mosk, Attorney General, Dan Kaufmann, Assistant Attorney General, and Ernest P. Goodman, Deputy Attorney General, for Respondents.

McComb, *J.*—Petitioners seek a writ of prohibition restraining respondents from taking any further steps to collect taxes assessed against them.

*Facts:* The taxes in question relate to assessments by the Franchise Tax Board of additional personal income taxes based on the disallowance of deductions claimed by petitioners on their California personal income tax returns. The disallowance of the deductions was based on former section 17359 of the Revenue and Taxation Code (now numbered § 17297), prohibiting the allowance of deductions to a taxpayer of any of his gross income from certain designated illegal activities.

Petitioners appealed the assessments of the Franchise Tax Board to the State Board of Equalization. The State Board of Equalization on September 20, 1962, rendered a decision upholding the validity of the

assessments. Petitioners have filed petitions for a rehearing with the State Board of Equalization with respect to such decision, but the petitions have not yet been acted upon by the board.

Respondents' contention that a writ of prohibition is not available to petitioners is correct for these reasons:

First: *The issuance of a writ of prohibition to restrain the collection of personal income taxes under the facts in the instant case is barred by statutory and constitutional provisions in this state.*

Section 19081 of the Revenue and Taxation Code, so far as here relevant, provides: "No injunction or writ of mandate or other legal or equitable process shall issue in any suit, action, or proceeding in any court against this State or against any officer of this State to prevent or enjoin the assessment or collection of any tax under this part. . . ."

Article XIII, section 15, of the California Constitution provides: ". . . No injunction or writ of mandate or other legal or equitable process shall ever issue in any suit, action or proceeding in any court against this State, or any officer thereof, to prevent or enjoin the collection of any tax levied under the provisions of this article; but after payment thereof action may be maintained to recover, with interest, in such manner as may be provided by law, any tax claimed to have been illegally collected."

This court in *Modern Barber Colleges, Inc. v. California Emp. Stab. Com.*, 31 Cal.2d 720 [192 P.2d 916], had occasion to consider section 45.11, subdivision (d), of the Unemployment Insurance Act, which section is similar to the statutory provision above quoted. The

court held the constitutional bar contained in article XIII, section 15, to be inapplicable, but nevertheless denied a writ of mandate and upheld the validity of the statutory provision there involved against claims that the taxpayer was being deprived of constitutional rights, stating at page 725 [4a]: "Implicit in the contention that the statute is unconstitutional is the assumption that the petitioner has some constitutional right which can be protected only by mandamus. The petitioner relies strongly on *Laisne v. State Board of Optometry*, 19 Cal.2d 831 [123 P.2d 457]. That case held that under the due process clauses of the federal and California Constitutions, and under the doctrine of separation of powers in our Constitution, the petitioner was entitled to a type of review or administrative activity which, under our practice, mandate alone could provide. But in the present case it is clear that depriving the petitioner of the remedy of mandate would not deprive him of due process of law, and no other constitutional right under which he might claim this particular form of relief has been suggested. *The due process clause does not guarantee the right to judicial review of tax liability before payment.* The power of a state to provide the remedy of suit to recover alleged overpayments as the exclusive means of judicial review of tax proceedings has long been unquestioned. [Citations.]" (Italics added.) (See also *Louis Eckert Brewing Co. v. Unemployment Reserves Com.*, 47 Cal.App.2d 844, 846 [1] [119 P.2d 227]; *Estate of Schneider*, 62 Cal. App.2d 463, 465 [3] [145 P.2d 90]; *Casey v. Bonelli*, 93 Cal.App.2d 253, 254 [1] [208 P.2d 723].)

The taxes involved in the present proceeding are income taxes levied under article XIII, section 11, of the

Constitution. Hence both the statutory bar contained in section 19081 of the Revenue and Taxation Code and the constitutional bar contained in article XIII, section 15, operate to prohibit issuance of the writ prayed for.

Petitioners contend, relying on authorities in other jurisdictions, that there is an exception to the above rule applicable to the facts in the present case, because of the great financial hardship involved. However, this argument is devoid of merit, because in *Modern Barber Colleges, Inc. v. California Emp. Stab. Com., supra,* we held contrary to their argument, saying at page 732: "The petitioner's allegation that payment of the claims asserted against it will render it insolvent is one which could be made against any tax and can have no relevancy in a situation where this court, by express legislative provision, is prohibited from interfering in advance of payment of the tax. The argument that compliance with the statute may cause hardship in some instances is one which can be addressed only to the Legislature."[1]

Second: *Petitioners have failed to exhaust their administrative remedies.*

Section 19082 of the Revenue and Taxation Code provides that after payment of the tax and denial by the Franchise Tax Board of a claim for refund, a taxpayer claiming that the assessment against him was

---

[1]It is interesting to note that in the present case the assessments for 1951 with respect to over half of the petitioners were for less than $100 each and that such amounts could have been paid as early as 1955, after which petitioners could have vindicated their rights in the courts. Since the operations of all petitioners here involved were identical, a test case as to one of the petitioners would have determined the validity of the assessments against all of them.

void, in whole or in part, may bring an action for recovery of all, or part, of the amount paid.

In the instant case petitioners have not paid their tax or filed claims for refund. Accordingly, they have failed to exhaust their administrative remedies before the Franchise Tax Board and are precluded from any court proceeding to test the validity of the tax.

Moreover, at the time the petition for a writ of prohibition was filed, the 30-day period for petitioning the State Board of Equalization for a rehearing was still open. All the taxpayers have petitioned the State Board of Equalization for a rehearing either concurrently with, or subsequent to, the filing of the present petition for a writ of prohibition, but the board has not yet acted on the request for a rehearing. It is thus apparent that even the administrative remedies before the State Board of Equalization have not been fully exhausted by petitioners.

In *Abelleira v. District Court of Appeal,* 17 Cal.2d 280 [109 P.2d 942, 132 A.L.R. 715], a writ of mandate and temporary restraining order against the payment of unemployment benefits under the Unemployment Insurance Act had been issued by the District Court of Appeal. It was there held, at page 291 [5], that the courts of the state are not available to a taxpayer prior to the exhaustion of administrative remedies before the administrative tribunals responsible for the administration of the tax and that the defect of failure to exhaust such remedies was jurisdictional.

In the instant case, petitioners' failure to exhaust their administrative remedies constitutes a jurisdictional barrier to obtaining relief from the courts.

Third: *A writ of prohibition is limited to a restraint of a threatened exercise of judicial power in excess of the jurisdiction of a tribunal, corporation, board, or person exercising judicial functions.*

Section 1102 of the Code of Civil Procedure expressly limits the availability of the writ of prohibition to arrest the exercise of judicial functions in excess of jurisdiction.[2]

In *Whitten v. California State Board of Optometry*, 8 Cal.2d 444, 445 [1] [65 P.2d 1296, 115 A.L.R. 1], this court, in discharging a writ of prohibition to restrain the revocation of a license by the State Board of Optometry, specifically held that the writ of prohibition is limited to the restraint of a threatened exercise of the judicial power in excess of jurisdiction and is not available to stay actions by an administrative agency unless the agency is exercising judicial powers conferred by the California Constitution.

The court pointed out that its prior decision in *Standard Oil Co. v. State Board of Equalization*, 6 Cal.2d 557 [59 P.2d 119], was controlling. That case established, at page 565 [4], that no judicial power has been, or could constitutionally be, conferred upon the State Board of Equalization.

The same restriction applies to the Franchise Tax Board. Accordingly, the writ of prohibition is not available to petitioners herein to restrain the action of either the State Board of Equalization or the Franchise Tax Board.

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[2]Section 1102 of the Code of Civil Procedure reads: "The writ of prohibition arrests the proceedings of any tribunal, corporation, board, or person exercising judicial functions, when such proceedings are without or in excess of the jurisdiction of such tribunal, corporation, board, or person."

In view of our conclusions, it is unnecessary to discuss other questions raised by counsel.

The order to show cause heretofore issued is discharged, and the application for writ of prohibition is denied.

Gibson, *C. J.*, Schauer, *J.*, Peters, *J.*, Tobriner, *J.*, and White, *J.*,* concurred.

*Retired Justice of the Supreme Court sitting pro tempore under assignment by the Chairman of the Judicial Council.

## APPENDIX "B".

96125

IT830
In replying refer to
Income Tax Division

Notice of Additional
Personal Income Tax
Proposed to be Assessed

State of California
Office of
FRANCHISE TAX BOARD
Sacramento 14

Roy C. Troeger
4600 Encino Avenue
Encino, California

Date: March 15, 1955

Notice is hereby given that the Income Tax Return of the above-named taxpayer for the taxable period ended December 31, 1953, Serial No. 2719121, has been examined, the correct amount of tax determined by the Franchise Tax Board and it is proposed to assess a deficiency tax in accordance with the provisions of the Personal Income Tax Law, in the amount of $6,658.20. The details of the proposed deficiency assessment and of computing said tax are set forth below.

| | | | |
|---|---|---|---|
| Amount Subject to Tax per Form 540 | | | $ 21,726.45 |
| Partnership Income | As Shown | $ 4,940.21 | |
| | As Revised | 49,546.42 | 44,606.21 |
| Income from Trusts | As Shown | $ 19,789.31 | |
| | As Revised | 86,698.62 | 66,909.31 |
| Revised additional income of The Blackout and Vogue as shown on attached schedule | | $892,124.10 | |
| Taxpayer's 5% interest | | 44,606.21 | |
| Troeger Trust 15% interest | $133,818.62 | | |
| Taxpayer's 50% interest in trust | | 66,909.31 | |
| Revised Amount Subject to Tax | | | 133,241.97 |
| Total Tax | | | 7,244.52 |
| Previously Assessed | | | 586.32 |
| Additional Tax | | | 6,658.20 |

The amount of tax must be transmitted to the Franchise tax Board by check or money payable to the Franchise Tax Board. Interest must be added at six per cent per annum from April 15, 1954 to the date of notice and demand or to date of payment, if paid to date of such notice.

This proposed deficiency assessment will become final within sixty days from date hereof, unless a protest in writing is filed with the Franchise Tax Board. See the reverse side of this form.

Interest as called for above must be included in remittance.

FRANCHISE TAX BOARD
John J. Campbell
Executive Officer

LPA:MC:RM—S

The Blackout and Vogue

Serial No. .....
Fiscal Year Ended
May 31, 1953

Schedule I

| | | | |
|---|---|---|---|
| Ordinary Income per Form 565 | | | $ 83,003.81 |
| Net Income | As Shown | $ 83,003.81 | |
| | As Revised | 975,127.91 | 892,124.10 |

| | |
|---|---|
| Cost of prizes | $738,223.05 |
| Expenses | 153,901.05 |
| Total disallowance | $892,124.10 |

This adjustment is made to disallow cost of prizes and other expenses in accordance with Section 17359 California Revenue and Taxation Code.

Revised Ordinary Net Income $975,127.91

## APPENDIX "C".

**Excerpt From Proceedings at the Protest Hearing Before the Franchise Tax Board (See p. 13 of Petition for Writ).**

"Mr. Hanson: *This is a hearing on the protest of Roy C. Troeger for the year 1951.* This issue involved is the legality or illegality of the particular types of games that were conducted by partnerships known as Blackout, and Vogue, and Jade and Cameo.

"Franchise Tax Board investigators have investigated these games, and as a result of their investigations, proposed assessments have been made. The proposed assessments have been protested on the ground that they are not illegal activities, and further that our Section 17359 and Section 17297 are unconstitutional. I believe that constitutes a short statement of exactly what we are concerned with today. We are concerned with the fact that whether these games are games of skill or games of chance. Under the Attorney General's opinion, February 19, 1951, cite 17 Opinion AG 63, the Attorney General held that these various games were lotteries and as such that they came within the Penal Code Sections 219 and 236. *We therefore are here for the purpose of hearing any information or evidence as to why these games should not be considered to be games of chance.*" (Protest Hearing, p. 3.)

## APPENDIX "D".

**Excerpt From Proceedings Before the State Board of Equalization (See p. 18 of Memorandum of Points and Authorities Attached to Original Petition for Writ).**

"Mr. LeSage: *So it would be the official position of the Board, if I understand your explanation, that if our clients in this case might decline to testify on the grounds that it might tend to incriminate them, that the Board would regard this as some evidence in support of the allegations?*

"Mr. Holden: *The factual allegations, not the legal allegations.*

"Mr. LeSage: *That's correct, isn't it?*

"Mr. Holden: *Yes. Well, it would tend to support the factual allegations.*

"Mr. LeSage: *You would draw an adverse conclusion from that that the charges perhaps are true and the allegations are true.*

"Mr. Holden: Yes."

(Transcript of proceedings before State Board of Equalization, p. 20.)